DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION

CA 05-1172

MAY 3, 2006

LANNY ROBERTS

APPELLANTS

V.

JIMMY MILLER, d/b/a Sandy Branch Mobile Homes

APPELLEE

APPEAL FROM THE HOWARD COUNTY CIRCUIT COURT
[NO. CV2004-30-2]

HONORABLE CHARLES YEARGAN, JUDGE

AFFIRMED

JOHN B. ROBBINS, Judge

This one-brief, pro se appeal concerns a dispute over the amount charged by appellee Jimmy Miller, d/b/a Sandy Branch Mobile Homes, to move appellant Lanny Roberts's mobile home. Following a trial on March 23, 2005, the circuit judge, sitting as fact-finder, awarded appellee $1937.35. Appellant now appeals and argues that error occurred because 1) he did not receive competent representation from his attorney, 2) he did not receive proper notice that a trial would be held on March 23, 2005, and 3) the damage award was miscalculated. We affirm.

Because appellant does not challenge the sufficiency of the evidence, we recite only those facts that are necessary to an understanding of the case. In 2001, appellant hired appellee to move his mobile home from Boyd, Texas, to Hartford, Arkansas. He paid appellee $3012.96 up front and signed an agreement to pay certain "increased" charges that might be incurred. According to appellee and one of his workers, Nick Velcoff, they encountered various unanticipated difficulties in moving the mobile home, including more mileage than appellant had represented; problems obtaining a moving permit due to unpaid taxes on the mobile home; tree limbs that needed to be cut at both the Texas and Arkansas

sites; circumnavigating a pond at the Texas site; and removing a fence at the Arkansas site. As a result, appellee told appellant prior to spotting the mobile home at its destination that there would be extra charges for the move.

Appellant, who would later say that he felt coerced into doing so, wrote appellee a check for an additional $2438 and asked for an itemized statement. However, according to appellant, when he did not receive the statement within a few days, he stopped payment on the check. Later, he spoke to appellee by phone and, according to him, made notes of the conversation in which appellee allegedly itemized additional charges amounting to $2437.35. However, appellant ultimately determined that the charges were unfounded and refused to pay.

As a result, in January 2003, appellee sued appellant in district court, seeking $2438 in damages. Appellant prevailed in that venue, and appellee appealed to Howard County Circuit Court where a trial de novo was held on March 23, 2005. At the conclusion of that action, the circuit judge ruled in appellee's favor, finding that "a number of witnesses testified that additional work was necessary" to prepare the pickup and destination sites; that, at the time appellant made the second payment, he advised appellee that he was satisfied except for the fact that he wanted an itemized list of the extra charges; and that appellant "presented no evidence to show that the additional charges were not necessary." The court then awarded appellee $1937.35, which was the $2437.35 figure that appeared on appellant's telephone notes, less a $500 discount that appellee agreed was warranted because appellant's brother had helped with some of the extra work. Appellant now appeals from the $1937.35 award.

Appellant argues first that he is entitled to reversal because his attorney for a short period during the pendency of the circuit-court appeal provided "incompetent legal

representation." We find no basis for reversal on this point. Setting aside the problem that appellant did not raise this issue below or fully develop the facts surrounding the alleged incompetence, claims of ineffective assistance of counsel—which are grounded in the Sixth Amendment—are not cognizable in ordinary civil cases. *See generally Tucker v. State*, 311 Ark. 446, 844 S.W.2d 335 (1993) (stating that there is no Sixth Amendment consideration in civil cases); *but see Jones v. Ark. Dep't of Human Servs.*, __ Ark. ___, __ S.W.3d __ (Mar. 24, 2005) (making an exception in termination-of-parental-rights cases). We therefore decline to reverse on this basis.

Next, appellant contends that, when he appeared in court on March 23, 2005, he expected that the proceeding would be a hearing rather than a trial on the merits. The circumstances show that appellant's expectation was justified. On November 19, 2004, appellant wrote a letter to the circuit judge requesting a hearing on a jurisdictional matter. On November 24, 2004, the court issued a notice that a "hearing" was scheduled December 1, 2004, and that a "trial date" would be set later. The December 1 hearing apparently did not take place because, on January 19, 2005, the court issued a notice that the matter previously set for December 1, 2004, was re-scheduled for a "hearing" on March 23, 2005.

Appellant appeared pro se on March 23, 2005; the case was called and witnesses were sworn. Appellee appeared as the second witness and said that, in order to obtain the moving permit in Texas, he made several trips to the county appraisal office to clear up the non-payment of property taxes on the mobile home. At this point, appellant told the court:

> I understood this was to be a hearing, not a trial, and I didn't bring my witnesses. I can bring two witnesses that will come before this Court and state that they overheard Mr. Miller talking on his phone to his office several times both days regarding the permits. My brother told him that they had already contacted the tax office.

The court questioned appellant as to why they would be having a "hearing ... if it wasn't a trial." Appellant said that he asked for a hearing "earlier when I was having trouble getting

an attorney." When the court asked "for what issue," appellant stated that the case was a "frivolous lawsuit" and that he had asked for a hearing "so I could present evidence that he has broken several Arkansas laws." After a few more remarks regarding appellant's difficulties in hiring a lawyer, the trial went forward.

Appellant cross-examined appellee and Nick Velcoff, and he presented the testimony of himself and his wife. During his own narrative, he referenced certain testimony by appellee that, after the mobile home was in place in Arkansas, the two of them had a conversation in which appellee offered to return and install anchor rods in the concrete pad. Appellant denied that the conversation had occurred and stated: "Again, Your Honor, if I could get a continuance, I could have my other two witnesses here and they could testify they overheard this conversation." Thereafter, the trial proceeded to its conclusion.

Appellant's assignment of error is premised on his inability to have two witnesses present, and he specifically told the court at one point that he could produce the witnesses "if I could get a continuance." We therefore analyze this issue in terms of whether a continuance should have been granted. *See, e.g., Whitmire v. State*, 50 Ark. App. 34, 901 S.W.2d 20 (1995). In order to obtain a continuance, a litigant must make a showing of good cause. *See* Ark. R. Civ. P. 40(b) (2005). A motion for a continuance is addressed to the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *See Jacobs v. Yates*, 342 Ark. 243, 27 S.W.3d 734 (2000); *Bolden v. Carter*, 269 Ark. 391, 602 S.W.2d 640 (1980). The appellant has the burden of demonstrating an abuse of discretion. *See Whitmire*, *supra*. That burden entails a showing of prejudice. *Id.*; *see also Jacobs*, *supra*. When a motion for a continuance is based on a lack of time to prepare, we consider the totality of the circumstances. *Whitmire*, *supra*.

We do not believe that appellant has demonstrated that he was prejudiced in this case. He claimed at trial that, if granted a continuance, his absent witnesses would contradict some of appellee's statements. Yet the subjects of the witnesses' purported testimony–appellee's "talking on the phone to his office" regarding the moving permits and appellee's conversation about returning to the destination site after the mobile home was in place–are vague and tangential at best. Appellant has not shown how the testimony would have any bearing on the issue of whether appellee was entitled to additional compensation for the extra work he performed in moving the mobile home. Thus, while it would be reversible error in many instances for a court to conduct a trial on the merits when a party has only been notified of a pre-trial hearing, *see Davis v. Univ. of Ark. Med. Ctr. & Coll. Serv., Inc.*, 262 Ark. 587, 559 S.W.2d 159 (1977); *Renfro v. City of Conway*, 260 Ark. 852, 545 S.W.2d 69 (1977); Ark. Code Ann. § 16-13-209 (Repl. 1999), given the totality of the circumstances here, we decline to reverse.

Finally, appellant argues that the trial court erred in calculating the amount of the damages. Appellant's presentation of this issue is difficult to follow, but we believe that he urges the following. In calculating damages, the trial court began with the $2437.35 figure contained on appellant's telephone notes. In those notes, one of the itemized charges listed was $1517.70 for "14 vs 16," meaning, according to appellant, an extra permit charge for moving a sixteen-foot-wide rather than a fourteen-foot-wide mobile home. However, the summary of additional charges that appellee presented at trial did not contain such a line item, and therefore, appellant claims, that item should not have been included in the damages.

There was contradictory evidence on this point at trial. Appellee testified that he did not recall making an extra charge for trailer width; rather, he charged for all of the extra work

that was required to move and spot the mobile home. Consistently with this, appellee's itemization contained a charge for "added move" of $1738. In light of these facts, we do not believe that the trial court clearly erred in its calculation of damages. *See Brown v. Blake*, 86 Ark. App. 107, 161 S.W.3d 298 (2004) (employing the clearly-erroneous standard in an appeal from a bench trial).

Affirmed.

PITTMAN, C.J., and BAKER, J., agree.